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SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-201

NEIL KAMERLING, RICHARD CANTELLO, EDWARD MORAN, JAMES J. SEABARKROB, AND JOSEPH J. ANASTASIO,

Petitioners,

-against-

JOHN T. O'HAGAN, Fire Commissioner, City of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

W. BERNARD RICHLAND,
Corporation Counsel
Attorney for the Respondent,
Municipal Building,
New York, New York 10007
(212) 566-4337 or 566-8305

L. KEVIN SHERIDAN,
MICHAEL AMBROSIO,
of Counsel.

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PRELIMINARY STATEMENT

Plaintiffs' civil rights complaint which challenged a regulation of the New York City Fire Department banning beards and setting limits on the length of firemen's hair, moustaches and sideburns was dismissed after trial by the District Court for the Eastern District of New York. The Court of Appeals for the Second Circuit affirmed.

QUESTION PRESENTED

Did the Fire Commissioner 's decision to prohibit firemen from wearing beards and to regulate the length of hair, moustaches and sideburns, as a safety measure, constitute an infringement of petitioners' constitutional rights?

OPINIONS BELOW

The opinions of both the Court of Appeals and the District Court are reprinted in full in the appendix to the petition. The Court of Appeals began by holding that the constitutional test to be used to measure the validity of the instant regulation was the same test as applied in Dwen v. Barry, 483 F. 2d 1126 (2nd Cir., 1973), cert. granted No. 74-1269, May 27, 1975, namely, whether the restriction on personal liberty was justified by a legitimate state interest reasonably related to the regulation. The court rejected as "without support in logic or precedent" the petitioners' suggestion that the Fire Commissioner had to establish a "compelling" state interest to justify the regulation. The court went on to find that the Fire Commissioner had both the right and the duty to seek to achieve maximum safety and that safety was a legitimate state interest. Finally, the court affirmed the finding of the District Court that the evidence offered by the Fire Commissioner established that the regulation, which applies only to personnel actively engaged in fire fighting, was reasonably related to the state's legitimate interest in health and safety.

ARGUMENT

THE TEST APPLIED BY THE COURTS BELOW TO DETERMINE THE CONSTITUTIONAL VALIDITY OF THE REGULATION CHALLENGED HEREIN WAS ENTIRELY APPROPRIATE

The petitioners contend that their right to choose their personal appearance can not be regulated by the state unless it can show a "compelling state interest in doing so. We submit that the Court of Appeals correctly rejected the petitioners' argument as without either logic or precedent.

The compelling state interest test has been employed by this Court to test regulations which restrict First Amendment freedoms. See, Thomas v. Collins, 323 U.S. 516 (1945) (free speech), and Sherbert v. Verner, 374 U.S. 398 (1963) (freedom of religion). This same test was applied in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), to measure the validity of a school regu-

lation which prohibited the wearing of armbands in school. The Court recognized that armbands are a method of expressing views and are a type of symbolic act closely akin to pure speech which is entitled to comprehensive protection under the First Amendment. The court in applying the compelling interest test to the regulation held it to be invalid but stated at page 508:

> "The problem posed by the present case does not relate to the regulation of the length of skirts or the type of clothing, to hair style, or deportment... It involves direct, primary First Amendment rights akin to 'pure speech'." (emphasis added)

Although this Court clearly indicated in Tinker that it did not view the issue of hair style as one of major significance, petitioners have, nevertheless, attempted to transmute their tonsorial predilections into a fundamental constitutional right. Clearly, there is no precedent for this. Some courts which have considered the constitutionality of hair style regu-

lations have found no constitutionally protected right to be involved. Others, like the Court of Appeals for the Second Circuit, have viewed the choice of hairstyle as part of the liberty protected by the 14th Amendment. Dwen v. Barry, 483 F 2d 1126 (2d Cir., 1973), cert. granted No. 74-1269, May 27, 1975.

Only one court of which we are aware, the United States Court of Appeals for the Seventh Circuit, has held, in Breen v. Kahl, 419 F. 2d 1034 (1969), that the right to select one's hair style is "fundamental" and that the state must bear a "substantial burden of justification" to restrict that right. The court, however, was unable to clearly identify the source of this "fundamental" right, and merely attributed it to the "penumbras" of either the First or Ninth Amendment. Petitioners' reliance on Breen, however, is misplaced. In Miller v. School District Number 767, 495 F. 2d 658 (7th Circ.,

1974), the court questioned the viability of its decision in Breen and concluded at page 664:

> "... if one's interest in appearing as he chooses is a constitutionally protected interest in liberty, it is of a much lesser magnitude than a 'fixed star in our constitutional firmament'."

Whatever may be the remaining precedential value of Breen, these petitioners failed to even suggest at trial that they viewed their hairstyles as a form of symbolic speech. If hair style is entitled to the special protection of the compelling state interest test, which has generally been reserved by this Court for First Amendment freedoms, it must be because hair style is a form of expression protected by that amendment. Although four of the five petitioners testified at the trial, not one of them even suggested that his choice of hairstyle was more than a question of taste.

Respondent has never suggested that

petitioners' choice of hair style is unprotected by the constitution. Since the decision in Dwen v. Barry the choice of one's own hair style has been recognized in the Second Circuit as part of that liberty protected by the 14th Amendment.

> "[But] [l]iberty under the Constitution is... necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." West Coast Hotel Co. v. Parrish, 300 U.S. 389, at 392 (1937).

The decisions in this case of both the District Court for the Eastern District of New York and the Court of Appeals clearly show that the regulation at issue was designed to enhance the safety of firemen and that safety is a legitimate community interest.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

September 19, 1975

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Respondent.

L. KEVIN SHERIDAN,
MICHAEL AMBROSIO,
of Counsel.